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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/828,905	04/21/2004	Richard Kunkel	42526-2800	5656

21611 7590 02/12/2007  
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EXAMINER
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FETSUGA, ROBERT M

ART UNIT	PAPER NUMBER
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3751

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	02/12/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/828,905	<b>Applicant(s)</b> KUNKEL, RICHARD	
	<b>Examiner</b> Robert M. Fetsuga	<b>Art Unit</b> 3751	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 12 December 2006.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-8 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-8 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

Art Unit: 3751

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on December 12, 2006 has been entered.

2. The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required: Proper antecedent basis for the "no top" feature set forth in claim 1 could not be found in the specification. Applicant is reminded claim terminology in mechanical cases should appear in the descriptive portion of the specification by reference to the drawing(s).

3. Claim 1 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The claim is unclear as to the metes and bounds of the language "no top" (ln. 4). Indeed, element 23 would appear to

Art Unit: 3751

form a "top" of the channel as water flow is contained thereby.

Furthermore, paragraph 0017 refers to "upper" walls (ln. 3).

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 1, 2 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Koren and Lesikar.

The Koren reference (Fig. 2) discloses a spa (col. 1 lns. 5-8) comprising: a circulating system (col. 2 lns. 37-39); a top rim (of 24); and a waterfall including a channel 16 having a

Art Unit: 3751

floor 56, side walls 50,51 and "no top" (col. 2 lns. 23-25), an access aperture 18, a lens 42, and a chamber 34. Therefore, Koren teaches all claimed elements except for the waterfall being embedded in the spa rim.

Although the waterfall of the Koren spa is not embedded, as claimed, attention is directed to the Lesikar reference which discloses an analogous spa (col. 1 ln. 11) which further includes a waterfall 16 embedded in a rim 39. Therefore, in consideration of Lesikar, it would have been obvious to one of ordinary skill in the spa art to embed the waterfall associated with the Koren spa in order to recess it below the top rim.

Applicant argues at pages 7-8 of the response filed December 12, 2006 neither Koren nor Lesikar teach a channel with "no top". The examiner can not agree since at least the Koren disclosure teaches this subject matter in the Fig. 2 embodiment as noted supra. While it is true Koren discloses a channel "top" 55 in the Figs. 1 and 3 embodiment to support a coping 28, this feature is necessarily missing from the Fig. 2 embodiment of Koren. Certainly, one skilled in the spa art would readily appreciate the Fig. 2 embodiment of Koren should not be used with a spa having such a coping 28 as no support therefor would exist. Furthermore, Lesikar teaches installing the waterfall 16 in the rim 39 before any coping is installed. Even installing

Art Unit: 3751

the Koren "no top" waterfall in a spa which is intended to later include coping would not detract from the waterfall being embedded in the spa rim as claimed.

6. Claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over Koren and Lesikar as applied to claim 2 above, and further in view of Lowry et al.

Although the channel of the Koren waterfall does not include a rib, as claimed, attention is directed to the Lowry et al. (Lowry) reference which discloses an analogous waterfall 16 which further includes a channel 63 having a rib (defined by 64). Therefore, in consideration of Lowry, it would have been obvious to one of ordinary skill in the waterfall art to associate a rib with the Koren channel in order to facilitate water flow.

Applicant argues at pages 8-9 of the response the undulating floor of Lowry "does not equate to the flow rib of claim 3." The examiner can not agree as the flow ribs 35 disclosed in the instant application and the flow ribs (defined by 64) taught by Lowry (col. 3 lns. 35-41) are for the same purpose of promoting laminar/sheet flow.

7. Claims 4 and 6-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Koren, Lesikar and Lowry as applied to claim 3 above, and further in view of Gaffney et al.

Art Unit: 3751

Re claim 4, although the channel of the Koren waterfall does not include a disruptor button, as claimed, attention is directed to the Gaffney et al. (Gaffney) reference which discloses an analogous waterfall which further includes a channel 47 having a disruptor button 59. Therefore, in consideration of Gaffney, it would have been obvious to one of ordinary skill in the waterfall art to associate a disruptor button with the Koren channel in order to perfect water flow. Applicant argues at page 9 of the response the disruptor button 59 taught by Gaffney is disclosed for use in performing an opposite function to the function associated with the disruptor button 37 disclosed in the instant application. The examiner does not necessarily disagree, however, no particular "function" is recited in claim 4. Furthermore, the structure defined by applicant's claim language is met by the structure taught by Gaffney in that many different flow patterns are possible depending upon channel size, button size, water flow rate, etc. None of these factors are reflected in the broadly claimed subject matter (nor even disclosed in the specification).

Re claim 6, although the parts of the Koren waterfall are not plastic, as claimed, attention is again directed to Gaffney which discloses plastic parts (col. 2 lns. 48-50). Therefore, in further consideration of Gaffney, it would have been obvious

Art Unit: 3751

to one of ordinary skill in the waterfall art to associate plastic with the Koren parts in order to facilitate molding. Applicant has not substantively argued this ground of rejection.

Re claim 8, the Koren lens is considered to "conform" to the channel floor. Applicant argues at page 9 of the response "Koren does not disclose a lens of any kind." The examiner can not agree and notes applicant has not provided any evidence to support this statement. Indeed, Koren teaches the cable ends 42 can be "END-GLOW™" cables (col. 3 lns. 16-18). Since light necessarily is supplied to the end of such a cable, and then is emitted therefrom, a "lens" is defined thereby.

8. Applicant is referred to MPEP 714.02 and 608.01(o) in responding to this Office action.

9. Any inquiry concerning this communication should be directed to Robert M. Fetsuga at telephone number 571/272-4886 who can be most easily reached Monday through Thursday. The Office central fax number is 571/273-8300.



Robert M. Fetsuga  
Primary Examiner  
Art Unit 3751